Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1998

MILLER AND SON PAVING, INC.,

Petitioner,

vs.

PLUMSTEAD TOWNSHIP,
BUCKS COUNTY, PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, Eastern District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Supreme Court of Pennsylvania decide an important federal question in a way that conflicts with the relevant decisions of your Honorable Court when it decided that a *de facto* taking did not occur when a property owner was prevented from using its property for a legitimate business purpose by a zoning ordinance which unconstitutionally excluded the business from the entire Township.

PARTIES TO THE PROCEEDING

The Petitioner is:

Miller and Son Paving, Inc.

The Respondent is:

Plumstead Township, Bucks County, Pennsylvania

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
The Supreme Court Of Pennsylvania Decided An Important Federal Question In A Way That Conflicts With The Relevant Decisions Of Your Honorable Court When It Decided That A *De Facto* Taking Did Not Occur When A Property Owner Was Prevented From Using Its Property For A Legitimate Business Purpose By A Zoning Ordinance Which Was Found To Unconstitutionally Exclude The Business From The Entire Township.	5
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

Agins v. Tiburon, 447 U.S. 255, 65 L. Ed. 2d 106 (1980) 10, 22

Appeal of Doyle, 142 Pa. Cmwlth. 672, 598 A.2d 352 (1991), *allocatur denied*, 530 Pa. 657, 608 A.2d 32 (1991) 13

Appeal of Miller and Son Paving, Inc., 161 Pa. Cmwlth. 138, 636 A.2d 274 (1993), *Petition for Allowance of Appeal Denied*, 538 Pa. 629, 646 A.2d 1182 (1994) 3, 14

Armstrong v. United States, 364 U.S. 40 (1960) 15

Borough v. City Keene, 121 N.H. 590, 432 A.2d 15 (1981) 17, 18

Corrigan v. City of Scottsdale, 149 Ariz. 538, 720 P.2d 513 (1986) 16, 17

DeBotton v. Marple Township, 689 F.2d 477 (3d. Cir. 1988) 21, 22

First English Evangelical Lutheran Church of Glendale v. The County of Los Angeles, California, 482 U.S. 304, 96 L. Ed. 2d 250 (1987) 4, 14, 15, 16, 23

Gaebel v. Thornbury Township, 8 Pa. Cmwlth. 339, 303 A.2d 57 (1973) 12, 13

Cited Authorities

Page

Lawton v. Steele, 152 U.S. 133, 38 L. Ed. 385 (1894) 11, 12

Legal Tender Cases, 12 Wall. 457 (1871) 8

Lucas v. South Carolina Coastal Council, 550 U.S. 1003, 120 L. Ed. 2d 798 (1992) 8, 9, 11

Merlin v. Commonwealth, 72 Pa. Cmwlth. 45, 455 A.2d 789 (1983) 13

Millcreek Township v. N.E.A. Cross Company, 152 Pa. Cmwlth. Ct. 576, 620 A.2d 558 (1993) 7

Miller and Son Paving, Inc. v. Plumstead Township Board of Supervisors, 62 Bucks Co. Law Rep. 254 (1993) 2

Miller and Son Paving, Inc. v. Plumstead Township, (Bucks County Court of Common Pleas Docket No. 94-00389-22-5) 4

Miller and Son Paving, Inc. v. Plumstead Township, Pa. Cmwlth. Ct. (unreported), 680 A.2d 5 (1996) 4

Miller and Son Paving, Inc. v. Plumstead Township, 547 Pa. 383, 690 A.2d 711 (1997) 4

Miller and Son Paving, Inc. v. Plumstead Township, (19 E.D. Appeal Docket 1997, decided August 17, 1998) 4

Cited Authorities

	Page
Mock v. Department of Environmental Resources, 154 Pa. Cmwlth. 380, 623 A.2d 940 (1993)	11
Odhner v. Township of Woodward, 143 Pa. Cmwlth. 450, 599 A.2d 276 (1991)	13, 14
PA Northwestern Distributors, Inc. v. Zoning Hearing Board of the Township of Moon, 526 Pa. 186, 584 A.2d 1372 (1991)	22
Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631 (1978)	9, 15
Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) ...	5, 8
Plumstead Township v. Miller and Son Paving, Inc., Pa. Cmwlth. (unreported), 661 A.2d 44 (1995)	14
Poirier v. Grand Blanc Township, 167 Mich. App. 770, 423 N.W. 2d 351 (1988)	16
Rippley v. City of Lincoln, 330 N.W. 2d 505 (N.D. 1983)	16
Sheerr v. Evesham Township, 184 N.J. Super. 11, 445 A.2d 46 (1992)	16
Transportation Co. v. Chicago, 99 U.S. 635 (1879) ..	8
United Artists Theater Circuit, Inc. v. City of Philadelphia, 535 Pa. 370, 635 A.2d 612 (1993) ..	9

Cited Authorities

	Page
Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 170 (1985)	14
Statutes:	
28 U.S.C. § 1257	1
Pennsylvania Eminent Domain Code, Act of June 22, 1964, Sp. Sess., P.L. 84, as amended, 26 P.S. 1-101, *et seq.*	4, 12
Section 609.1 of the Pennsylvania Municipalities Planning Code (the "MPC"), Act of December 21, 1988, P.L. 1329 No. 170, as amended, 53 P.S. 10609.1	2
Pennsylvania Municipalities Planning Code, 53 P.S. 11006-A(c)	3
United States Constitution:	
Fifth Amendment	1, 8, 21, 23
Fourteenth Amendment	2
Rule:	
United States Supreme Court Rule 10	6

APPENDIX

Page

Appendix A — Opinion Of The Supreme Court Of Pennsylvania, Eastern District Decided August 19, 1998 ..... 1a

Appendix B — Opinion And Order Of The Commonwealth Court Of Pennsylvania Filed June 21, 1996 ..... 9a

Appendix C — Opinion Of The Court Of Common Pleas Of Bucks County, Pennsylvania Dated August 20, 1995 ..... 17a

OPINIONS BELOW

The August 19, 1998 Opinion of the Supreme Court of Pennsylvania reversing the Order of the Commonwealth Court of Pennsylvania has not been reported as of the filing of this Petition. It is reprinted in the Appendix at App. 1a. The June 21, 1996 Opinion of the Commonwealth Court of Pennsylvania was not reported by the Commonwealth Court, *see* 680 A.2d 5 (1996). It is reprinted in the Appendix at App. 9a. The August 28, 1995 Opinion of the Court of Common Pleas of Bucks County, Pennsylvania is reprinted in the Appendix at App. 17a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the August 19, 1998 Order of the Supreme Court of Pennsylvania that reversed the June 21, 1996 Decision of the Commonwealth Court of Pennsylvania which affirmed the Order of the Court of Common Pleas of Bucks County, Pennsylvania entered May 5, 1995 which "Denied, Dismissed and Overruled the Township's Preliminary Objections" to Petitioner's Petition for the Appointment of a Board of Viewers. Jurisdiction of this Court to review the judgment of the Supreme Court of Pennsylvania is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, which provides:

> No person . . . shall be . . . deprived of life liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment of the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In June, 1988, Petitioner, Miller and Son Paving, Inc. (hereinafter referred to as "Petitioner" or "Miller") acquired a 150-acre tract of land located in Plumstead Township, Bucks County, Pennsylvania (hereinafter referred to as "Respondent" or "Township") for a quarry. The Plumstead Township Zoning Ordinance in effect at the time unconstitutionally excluded quarrying from the entire Township. Therefore, Petitioner filed a curative amendment application with Respondent seeking to declare its Zoning Ordinance unconstitutional pursuant to Section 609.1 of the Pennsylvania Municipalities Planning Code (the "MPC"), Act of December 21, 1988, P.L. 1329 No. 170, as amended, 53 P.S. 10609.1. A "Curative Amendment" is the manner in which the substantive validity of a zoning ordinance is challenged in Pennsylvania.

After 46 monthly hearings, The Board of Supervisors of Plumstead Township denied Petitioner's curative amendment application. Petitioner filed an appeal to the Court of Common Pleas of Bucks County, Pennsylvania. A panel of three Judges, President Judge Kenneth G. Biehn, the Honorable Isaac S. Garb and the Honorable Edward G. Biester, Jr., unanimously declared the Ordinance unconstitutional but denied site specific relief, *i.e.* the right to quarry the property.[1] A timely appeal was perfected to the Commonwealth Court of Pennsylvania, which affirmed the Court of Common Pleas insofar as it declared the

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1. *Miller and Son Paving, Inc. v. Plumstead Township Board of Supervisors*, 62 Bucks Co. Law Rep. 254 (1993).

Ordinance unconstitutional, but reversed the denial of site specific relief and granted Petitioner the right to quarry its property.[2] The Commonwealth Court remanded the case to the Court of Common Pleas pursuant to Section 1006-A(c) of the MPC, 53 P.S. 11006-A(c) to determine the extent of the relief to which Petitioner was entitled. Respondent and the Plumstead Township Civic Association filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which was denied.

During the course of the curative amendment hearings, Petitioner applied for and was granted all of the permits from all of the state administrative agencies which are necessary for Petitioner to quarry the property. At the time these permits were received, Petitioner could have commenced quarrying the property but for the unconstitutional exclusion of quarrying by the Respondent's Zoning Ordinance.

Following the decision of the Supreme Court of Pennsylvania denying the Respondent and the Civic Association's Petitions for Allowance of Appeal, Petitioner filed a Petition for Appointment of a Board of View in the Court of Common Pleas of Bucks County, Pennsylvania in order to have damages assessed for the *de facto* temporary taking of its property during the period of time it was challenging the constitutionality of the Zoning Ordinance. On January 24, 1994, the Honorable Kenneth G. Biehn, President Judge, granted Petitioner's Petition and appointed a Board of View to assess damages. Thereafter, Respondent filed Preliminary Objections challenging the appointment of the Board of View.

On May 5, 1995, following submission of legal memoranda by the parties and oral argument, the Honorable Cynthia M.

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2. *Appeal of Miller and Son Paving, Inc.*, 161 Pa. Cmwlth. 138, 636 A.2d 274 (1993), *Petition for Allowance of Appeal Denied*, 538 Pa. 629, 646 A.2d 1182 (1994).

Weaver dismissed the Respondent's Preliminary Objections. Judge Weaver found that the unconstitutional zoning ordinance was a taking of Petitioner's property because, "but for the unconstitutional zoning ordinance, the land would have been mined by Miller." Therefore, the Court concluded as a matter of law, that Miller established a compensable, temporary *de facto* taking for the period between the date the property was purchased and the date the zoning ordinance was invalidated.[3] The Commonwealth Court of Pennsylvania affirmed the denial of the Preliminary Objections[4]. It relied on your Honorable Court's Decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) for the proposition that Miller was not precluded from bringing an action under the Pennsylvania Eminent Domain Code, Act of June 22, 1964, Sp. Sess., P.L. 84, as amended, 26 P.S. 1-101, *et seq.* for damages that it suffered during the period of the taking. Thereafter, the Respondent's Petition for Allowance of Appeal was granted by the Supreme Court of Pennsylvania[5] and the Supreme Court of Pennsylvania subsequently reversed the Commonwealth Court and sustained the Respondent's preliminary objections[6]. This Petition follows.

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3. *Miller and Son Paving, Inc. v. Plumstead Township*, (Bucks County Court of Common Pleas Docket No. 94-00389-22-5) *see* Appendix C at App. 17a.

4. *Miller and Son Paving, Inc. v. Plumstead Township*, Pa. Cmwlth. Ct. (unreported), 680 A.2d 5 (1996) *see* Appendix B at App. 9a.

5. *Miller and Son Paving, Inc. v. Plumstead Township*, 547 Pa. 383, 690 A.2d 711 (1997).

6. *Miller and Son Paving, Inc. v. Plumstead Township*, (19 E.D. Appeal Docket 1997, decided August 17, 1998) (presently unreported). *See* Appendix A at App. 1a.

REASONS FOR GRANTING THE WRIT

THE SUPREME COURT OF PENNSYLVANIA DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF YOUR HONORABLE COURT WHEN IT DECIDED THAT A *DE FACTO* TAKING DID NOT OCCUR WHEN A PROPERTY OWNER WAS PREVENTED FROM USING ITS PROPERTY FOR A LEGITIMATE BUSINESS PURPOSE BY A ZONING ORDINANCE WHICH WAS FOUND TO UNCONSTITUTIONALLY EXCLUDE THE BUSINESS FROM THE ENTIRE TOWNSHIP.

This case presents your Honorable Court with the question of whether a landowner suffers a *de facto* taking of its property where a zoning ordinance unconstitutionally prevents a landowner from using its property for a lawful business purpose throughout the entire municipality.

In 1922, Justice Oliver Wendell Holmes coined the oft-cited maxim that, "While property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). While your Honorable Court and many other courts around the country have had difficulty in identifying when an ordinance goes too far, certainly, it must be conceded by all that an ordinance that is declared unconstitutional because it unlawfully prevents the use of a person's property for a legitimate business purpose is a regulation that goes too far. As a regulation that goes too far, it must be recognized as a taking. Therefore, when the Supreme Court of Pennsylvania found that a "compensable taking does not result from a zoning ordinance which is ultimately declared invalid," *see* App. 2a, it decided an important federal question in a way that was not consistent with the prior decisions of your Honorable Court and therefore,

pursuant to Rule 10 of the Rules of the United States Supreme Court, your Court should exercise its discretion and grant this Writ of Certiorari.

The question presented to your Honorable Court is strictly a matter of law. Judge Weaver of the Court of Common Pleas of Bucks County succinctly reviewed the standard by which Preliminary Objections to a Petition for the Appointment of Viewers are reviewed by Pennsylvania courts. She noted:

> Preliminary Objections in the context of eminent domain actions serve a broad purpose intended to resolve both factual and legal challenges. *North Penn Water v. A Certain Parcel of Land Identified By Last Known Owner and Tax Parcel Number as Michael H. Malin and Dorothy Seimel Malin*, 168 Pa. Cmwlth. 477, 650 A.2d 1197, 1201 (1994). The proper mode of challenging a petition for appointment of viewers filed by condemnee is by preliminary objections. *In Re: Condemnation by Com., Dept. of Trans.*, 112 Pa. Cmwlth. 368, 535 A.2d 1210 (1988), *appeal denied*, 519 Pa. 655, 546 A.2d 60. An order dismissing preliminary objections to a petition for appointment of viewers under the Eminent Domain Code is a final appealable order that will not be overturned absent abuse of discretion or error of law by the trial court. *Riedel v. County of Allegheny*, 159 Pa. Cmwlth. 583, 633 A.2d 1325 (1993).
>
> The Eminent Domain Code authorizes filing of a petition for appointment of viewers when there has been no declaration of taking filed by the condemnor. *Millcreek Tp. v. N.E.A. Cross Co.*, 152 Pa. Cmwlth. 576, 620 A.2d 558 91993), *appeal*

> *denied*, 537 Pa. 655, 644 A.2d 739. When a petition for a board of viewers alleges a de facto taking and preliminary objections are thereafter filed, an evidentiary hearing is not necessary if an issue of fact is not raised. *Id.* When no disputed factual issue exists and the issues before the trial court are purely legal, preliminary objections may be ruled upon without a hearing. 26 P.S. Section 1-504; *Millcreek Tp.*, 152 Pa. Cmwlth. 576, 620 A.2d at 588; *Miller v. Com. Dept. of Transp.*, 91 Pa. Cmwlth. 622, 498 A.2d 1370 (1985).

Upon review of Miller's Petition, Judge Weaver determined that "a cause of action for compensable injury by reason of a temporary *de facto* taking existed and that only legal issues remained to be resolved." App. 21a. Therefore, as no disputed factual issues existed and as the issues before the Court were purely legal, Judge Weaver ruled upon the Preliminary Objections without a hearing in accordance with the procedure outlined in *Millcreek Township v. N.E.A. Cross Company*, 152 Pa. Cmwlth. Ct. 576, 620 A.2d 558 (1993) and denied the Preliminary Objections as a matter of law. The Commonwealth Court of Pennsylvania agreed that no questions of fact were presented and affirmed the decision of the Court of Common Pleas as a matter of law. The Supreme Court of Pennsylvania also considered the issue as purely a matter of law although it reversed the decision and granted the Preliminary Objections.

As noted above, it is difficult and at times impossible to draw a sharp line between valid or constitutional zoning on one hand, which does not constitute a taking even though it restricts the use to which a person may make of his land, and illegal or unconstitutional zoning on the other hand which unlawfully restricts a property owner from using his land and amounts to a taking. However, when the line is crossed and

there is a judicial determination that a zoning ordinance is unconstitutional, a taking occurs which gives a landowner the opportunity to seek damages for interference with his constitutionally guaranteed right to use his or her property unfettered by an unconstitutional governmental restriction. In this circumstance, the question of whether there is a taking is purely a question of law which is answered in the affirmative when an ordinance is declared unconstitutional.

Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, *supra*, it was generally thought that the takings clause of the Fifth Amendment reached only a direct appropriation of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a "practical ouster of the [owners] possession". *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879). However, as your Honorable Court pointed out in *Lucas v. South Carolina Coastal Council*, 550 U.S. 1003, 120 L. Ed. 2d 798 (1992):

> "Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriation of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by the constitutional limits. 260 U.S., at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]' Id., at 415. These considerations gave birth in that case to the oft-cited maxim that, 'while property may be regulated to a certain extent, *if regulation goes too far, it will be recognized as a taking*.' Ibid." (Emphasis added).

An unconstitutional zoning ordinance must, by definition, be a regulation that "goes too far". Because it goes too far, it is a taking. And, as Judge Weaver noted in her opinion denying the Respondent's Preliminary Objections:

> The Petition submitted by Miller conclusively established that, *but for* Township's unconstitutional zoning ordinance, the land would have been mined by Miller. As Miller was precluded from using the land as a quarry during the period the ordinance was being challenged, a compensable *de facto* taking occurred as a matter of law.

App. 22a.

The Supreme Court of Pennsylvania found that no taking occurred because Miller was not denied all use of its property during its challenge to Plumstead Township's zoning ordinance.[7] In reaching this conclusion, the Supreme Court of Pennsylvania failed to distinguish between those cases where the Court is attempting to determine whether or not a regulation goes too far, *See e.g. United Artists Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612 (1993); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631 (1978); *Lucas v. South Carolina Coastal Council*,

7. Although the Supreme Court of Pennsylvania holds that Miller could have used its property for residential purposes, *i.e.* build a housing development while it was challenging the zoning ordinance, it did not explain how Petitioner could use its property for a quarry once its challenge to the constitutionality of the zoning ordinance was sustained if it had previously developed its land for housing. In order for Petitioner's right to challenge an Ordinance to be meaningful, Petitioner must be able to use the property for the purpose for which it challenges the Ordinance if the challenge is successful. Therefore, Miller was not required to put its property to some other use while it challenged the ordinance which illegally prevented its lawful use as a quarry.

supra. and those cases, such as the instant case, where the regulation has already been found unconstitutional, *i.e.* has been found to go too far. The distinction is clearly stated in your Honorable Court's decision in *Agins v. Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106 at 112 (1980) as follows:

> The application of a general zoning law to particular property affects a taking if the ordinance does not substantially advance legitimate state interests, *or* denies an owner economically viable use of his land (citation omitted).

It is an "either/or" test to determine whether a taking has occurred. Either the ordinance does not advance legitimate state interests, and a finding that a zoning ordinance is unconstitutionally exclusionary is a *per se* finding that the ordinance does not advance legitimate state interests, or the ordinance denies an owner of all economically viable use of its land in which case it is invalid even if it advances a legitimate state interest. These tests are mutually exclusive; but in either case there is a taking.

The question of whether an ordinance denies all economically viable use of a property owner's land is a test to determine an ordinance's validity. It is not applicable where general zoning law provides a property owner an independent remedy to determine if an ordinance in invalid. Therefore, it is not applicable to the present case.

Paraphrasing *Agins*, the application of a Township's zoning ordinance to a particular property affects a taking when the ordinance is found to be unconstitutionally exclusionary. The taking is automatic. It flows from the finding that the ordinance's restriction of the lawful use of a person's property does not advance legitimate state interests. Once this finding

is made, a taking has occurred and the case then moves forward to determine what damages flow from that taking.

Former President Judge Craig speaking for the Commonwealth Court of Pennsylvania in *Mock v. Department of Environmental Resources*, 154 Pa. Cmwlth. 380, 623 A.2d 940 (1993) recognized the distinction between the *Lucas* analysis which seeks to determine whether or not a regulation is a taking because it denies all economically beneficial use of the land, and the traditional takings analysis. He noted:

> Although we have determined that the *Mock* case is not the extraordinary one when no economically beneficial use of land is permitted [citing *Lucas*], we must still evaluate the situation under the principles of [traditional] takings analysis established by previous court decisions.

Judge Craig began the Court's analysis by referring back to *Lawton v. Steele*, 152 U.S. 133, 38 L. Ed. 385 (1894) in which your Honorable Court provided a three (3) part test for determining the validity of a state's action under its police power;

(1) the public interest must require such interference;

(2) the means chosen must be reasonably necessary for the accomplishment of the purpose; and

(3) the means chosen must not be unduly oppressive on individuals.

In *Mock*, the Commonwealth Court of Pennsylvania was required to engage in this analysis because there was no independent judicial forum in which to determine whether or

not the regulation in question was invalid. By contrast, in the instant case the MPC provides an independent procedure by which the validity of the ordinance is determined prior to the taking claim being asserted. Once the determination is made pursuant to the curative amendment process that the ordinance is unconstitutional, there is a *per se* violation of the three (3) part test as first enunciated by the United States Supreme Court in *Lawton* in 1894. First, there can be no interests of the general public in adopting and enforcing an unconstitutional zoning ordinance. Second, an unconstitutional zoning ordinance can never supply reasonable means for the accomplishment of a lawful purpose, in this case, the exclusion of quarrying from Plumstead Township. Finally, an unconstitutional zoning ordinance is unduly oppressive upon the property owner as it prevents the property owner from making a lawful use of its property.

The Supreme Court of Pennsylvania's decision in this case that a taking did not occur is inconsistent with its own decisions. Heretofore, Pennsylvania Courts have uniformly held that a property owner cannot challenge the constitutionality of a zoning ordinance under the provisions of the Pennsylvania Eminent Domain Code, the Act of June 22, 1964, Sp. Sess., P.L. 84, as amended, 26 P.S. 1-101, *et seq.* until a zoning ordinance has been found to be invalid. For example, in *Gaebel v. Thornbury Township*, 8 Pa. Cmwlth. 339, 303 A.2d 57 (1973), the Gaebels owned property which was rezoned as a floodplain, severely limiting the use of their land. They filed an action under the Eminent Domain Code before challenging the validity of the ordinance pursuant to the MPC. Preliminary Objections were sustained to their Petition for the Appointment of Viewers. The Gaebels appealed the decision to the Commonwealth Court which held:

> What we decide today is that Gaebels exclusive recourse is to challenge the constitutionality of . . .

> [the] zoning ordinance under the provisions of review established by the MPC, and they cannot, *at this time*, avail themselves of compensation under the provisions of the Eminent Domain Code.

(Emphasis added). *Id.* at 403, 303 A.2d at 60. The Gaebels could not proceed to seek damages under the Eminent Domain Code because the ordinance had not been declared unconstitutional. However, once the ordinance was declared unconstitutional, as in the case before your Honorable Court, the Gaebels could proceed to bring their action under the Eminent Domain Code for damages. *Accord*, *Merlin v. Commonwealth*, 72 Pa. Cmwlth. 45, 455 A.2d 789 (1983).

The Commonwealth Court of Pennsylvania reached a similar decision in *Appeal of Doyle*, 142 Pa. Cmwlth. 672, 598 A.2d 352 (1991), *allocatur denied*, 530 Pa. 657, 608 A.2d 32 (1991). In *Doyle*, the property owners challenged the denial of a subdivision plan. They initially brought an action challenging the denial of the plan under the MPC. While that action was pending, they also filed an action under the Eminent Domain Code. Judge Ward F. Clark of the Court of Common Pleas of Bucks County, Pennsylvania sustained the Township's Preliminary Objections to the landowner's Petition for the Appointment of a Board of View holding

> consistent with *Gaebel*, we hold that Respondents must first exhaust their remedies under the MPC before they can bring an action for inverse condemnation under the Eminent Domain Code.

Appeal of Doyle, 142 Pa. Cmwlth. at 677, 598 A.2d at 354. *Accord*, *Odhner v. Township of Woodward*, 143 Pa. Cmwlth. 450, 599 A.2d 276 (1991) (". . . until the landowner has pursued the remedies provided within the MPC to invalidate the

ordinance, a compensation claim for the temporary taking is not ripe").

In the case before your Honorable Court, the Petitioner has followed the appropriate procedure in Pennsylvania by first proceeding under the MPC to have the ordinance declared unconstitutional and then proceeding under the Eminent Domain Code for damages.[8] Per the *Odhner* decision, under Pennsylvania Law, the claim for the temporary taking is now ripe. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 170 (1985).

Your Honorable Court's decision in *First English Evangelical Lutheran Church of Glendale v. The County of Los Angeles, California*, 482 U.S. 304, 96 L. Ed. 2d 250 (1987) observed that:

> Invalidation of the ordinance or its successor ordinance after this period of time, although converting the taking into a 'temporary one', is not a sufficient remedy to meet the demands of the just compensation clause.[9]

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8. The litigation concerning whether Miller was entitled to a blacktop plant and redi-mix concrete plant in addition to the quarry, *Plumstead Township v. Miller and Son Paving, Inc.*, Pa. Cmwlth. (unreported), 661 A.2d 44 (1995) concluded after the Petition for the Appointment of a Board of View was filed. However, it only decided the scope of the site specific relief to which Appellee was entitled and hence is only relevant to the damages to which Appellee is ultimately entitled. Appellee did not apply for the Board of View until the Plumstead Township Zoning Ordinance had been found unconstitutional in *Appeal of Miller and Son Paving, Inc.*, 161 Pa. Cmwlth. 138, 636 A.2d 161 (1993), *allocatur denied*, 538 Pa. 629, 646 A.2d 1182 (1994).

9. The *First English* Court specifically held that when a government's activities work a taking, no subsequent action by the

(Cont'd)

Nonetheless, the Supreme Court of Pennsylvania in footnote 4 to its Opinion, App. 6a, seems to argue that it is somehow unfair to impose damages on a Township that is defending its unconstitutional zoning ordinance. Initially, we note that if it is brought to a municipality's attention that it has enacted an unconstitutional zoning ordinance, the municipality has the obligation to promptly correct the ordinance, not to attempt to delay the inevitable by endless court challenges. Miller consumed eight (8) years obtaining the right to quarry its property despite the seemingly endless efforts of the Township to prevent it from opening its quarry.

The Petitioner should not be required to bear the cost of challenging the invalid ordinance, suffer the cost of carrying the property during the course of the challenge and accept the loss of profits from the property while it challenges an unconstitutional zoning ordinance. As your Honorable Court observed in *First English*, citing with approval *Armstrong v. United States*, 364 U.S. 40 (1960) and *Penn Central Transportation Co. v. New York City*, *supra.*, "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar government from forcing some people along to bear public burdens, which in all fairness and justice, should be borne by the public as a whole'." As your Honorable Court has noted in *First English*, it is the public's burden to pay the costs of unconstitutional restrictions placed on the use of property by the Township.

(Cont'd)
government can relieve it of the duty to provide compensation for the period during which the taking was effective. After reaching this result, your Honorable Court remanded the case to California to determine whether or not the ordinance involved was invalid. Ironically, the Appellant had never challenged the validity of the land use regulation in the California Courts, a practice that would not be permitted in Pennsylvania.

The Petitioner is not seeking to make the "most profitable use" of its property as is stated by the Supreme Court of Pennsylvania, App. at 6a. Frankly, Petitioner does not know what the most profitable use of its property is. It simply wanted to make use of its property as a quarry for its construction business. Quarrying was not a use that was permitted somewhere else in the Township, but not permitted in the district where Respondent wished to open the quarry. Rather, it was a use that was totally prohibited anywhere in the Township. For that reason, the ordinance was declared unconstitutional and Petitioner was permitted to use its property as a quarry. However, achieving the eventual right to use its property as a quarry did not make Petitioner whole. Petitioner was injured by not being able to use its property for a lawful use until it was successful in challenging the constitutionality of the Township's zoning ordinance. Therefore, it should be permitted to recover its losses during the period it was challenging the unlawful zoning ordinance. As your Honorable Court observed in *First English*, the granting of site specific relief which follows the finding that Petitioner was unconstitutionally prevented from using its property converts the taking to a temporary one but does not provide a sufficient remedy to meet the demands of the just compensation clause.

Each State that has considered the issue has found that temporary takings are compensable in the zoning context. *See Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513 (1986); *Rippley v. City of Lincoln*, 330 N.W. 2d 505 (N.D. 1983); *Sheerr v. Evesham Township*, 184 N.J. Super. 11, 445 A.2d 46 (1992), *Poirier v. Grand Blanc Township*, 167 Mich. App. 770, 423 N.W. 2d 351 (1988). The *Poirier* court recognized that a zoning ordinance can destroy the use and enjoyment of property just as effectively as a formal condemnation. The court noted:

> The *First English* Court rejected the argument that the only remedy is to challenge the regulation. That the right to compensation should not depend on whether the taking was accomplished by police power or by Eminent Domain is supported by the following language in *Schwartz v. City of Flint*, 426 Mich. 295, 395 N.W. 2d 678 (1996): "Police power regulations such as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property to promote the public good just as effectively as formal condemnation or a physical invasion of property . . ." *[T]he Constitution measures a taking of property not by what a state says or by what it intends, but by what it does.*

(Emphasis added).

The Supreme Court of Arizona reached the same result in *Corrigan v. City of Scottsdale*, *supra*, holding that a landowner having obtained a declaration that a zoning ordinance was unconstitutional was not only entitled to an invalidation of the ordinance, but was also entitled to money damages for the time between the taking and the invalidation of the ordinance based on the actual losses sustained. The Court quoted with approval *Borough v. City Keene*, 121 N.H. 590, 432 A.2d 15 (1981) in which the Court observed that:

> limiting the landowner to actions which only invalidate an offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens accompanying "progress" upon individual landowners rather than the public at large. The allowance of damages . . . during the period of the taking, however, should

> encourage such officials to stay well on the constitutional side of the line . . .

Id. 121 N.H. at 599, 432 A.2d at 20.

The *Corrigan* Court also analyzed the arguments generally made by municipalities attempting to avoid the imposition of damages when an ordinance is found to be unconstitutional. In a very thorough analysis, the Court explained:

> We note that the reasons generally given for denying damages are that: (1) it usurps a legislative function; (2) it threatens substantial fiscal liability on local governments; and (3) it would inhibit governmental land planning. Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land use Regulations*, 29 UCLA L.Rev. 711, 725 (1982). See also Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark.L.Rev. 612, 643-644 (1983). We believe these reasons do not justify such a rule.
>
> First, since zoning is an exercise of the police power, it is often deemed a legislative function. *Davis v. Pima County*, 121 Ariz. at 345, 590 P.2d at 461; Note, supra at 725. Thus some argue that the awarding of damages deprives the legislative body of being the one to decide whether the regulation is appropriate in light of the fact that compensation will be paid. Such an argument misses the point. No legislative prerogative is usurped by awarding damages for the time the property was temporarily taken under an invalid zoning ordinance. The regulating body can still weigh all the relevant considerations and determine for itself how best to

effectuate its policy in the future. The same alternatives are open to them after a remedy of invalidation plus temporary damages as exist after invalidation alone. The legislative body may pay to acquire the land outright, agree to pay the landowner a certain amount in order to continue the regulation, or simply abandon the regulation altogether. All that is added by an award of temporary damages is that the landowner is compensated for losses that he has already suffered by virtue of the unconstitutional taking. See *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. at 656-657, 101 S.Ct. at 1306; Note, supra at 725-729.

Second, fears of fiscal liability did not stop courts from limiting or abolishing municipal sovereign immunity and likewise should not bar a person's constitutionally guaranteed compensation for the impermissible taking of his property. Id. at 726-727. Further, fiscal liability may be an incentive for responsible public planning. In this we note that a local government will not be liable for any substantial liability unless it irresponsibly imposed staggering losses onto a private citizen by its land regulation. D. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, in 1982 Zoning and Planning Law Handbook 201 (F.Strom.ed. 1982) (also found in Zoning & Plan.L.Rep. v. 4, n. 6 (June, 1981).

Finally, we do not believe that advocating responsible governmental planning is the same thing as inhibiting governmental planning. Public officials should consider their actions before enacting them. Mere invalidation does not provide an incentive for

public planners not to experiment at an individual property owner's expense. Neither does invalidation provide any deterrent impact; instead the city can and often does enact another similarly restrictive regulation and force the landowner to undergo another costly litigation battle. (FN2) Without damages remedy, invalidation alone is a toothless tiger "capable of great roars about constitutional property rights but ineffectual in guarding against even obvious excesses resulting from multiple regulation." Note, supra at 734.

FN2. We borrow a portion of a footnote from Justice Brennan's dissent in *San Diego Gas & Elec. v. City of San Diego* because of its obvious relevance:

Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the governmental entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN."

If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra "goodies" contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C.3d 110, [109 Cal.Rptr. 799, 514 P.2d 111] appears to allow the City to change the regulation in question, even after trial and judgment,

make it more reasonable, more restrictive, or whatever, and everybody starts over again.

"See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, *Avoiding and Defending Constitutional Attaches on Land Use Regulations (Including Inverse Condemnation)*, in 388 NIMLO Municipal Law Review 192-193 (1975) (emphasis in original). *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 656, n. 22, 101 S.Ct. at 1306, n. 22 (BRENNAN, J., dissenting).

The policy reasons in favor of denying damages are not persuasive. Governmental entities should be as mindful of a person's constitutional rights as anyone else. Therefore, *under our constitutional provision requiring a payment of money for an unconstitutional taking of a person's property, we hold that invalidation is not the sole remedy, and the landowner is entitled to money damages from the time the regulation was protested or challenged.* Statements in Davis which prohibit any recovery of money damages for a regulatory taking, by a confiscatory zoning ordinance, are overruled. (Emphasis added)

DeBotton v. Marple Township, 689 F.2d 477 (3d. Cir. 1988) does not require a different result. In *DeBotton*, Judge Gawthrop of the United States Court of Appeals for the Third Circuit held that the Township's denial of a property owner's curative amendment challenge to a zoning ordinance does not constitute a taking for Fifth Amendment purposes. By contrast, in the instant case the curative amendment was granted, the ordinance was found to be unconstitutional, *i.e.* it was found to

go too far, and therefore a taking occurred. In *DeBotton*, there was no finding that Marple Township's zoning ordinance was invalid which is a prerequisite to a takings claim. Furthermore, the Court in Footnote No. 1 recognized that Mr. DeBotton could not have brought an action in state court for inverse condemnation because Pennsylvania, at the time, did not recognize regulatory takings. Furthermore, Judge Gawthrop did permit Mr. DeBotton to maintain a claim for damages under the theory that he was denied substantive and procedural due process as a result of the Township's refusal to hold hearings on his curative amendment. Therefore, Mr. DeBotton had his day in court in which he was permitted to seek damages even though under the facts of the case it was not a classic taking situation. Furthermore, *DeBotton* is distinguishable from the instant case because Pennsylvania has now recognized temporary takings in the zoning context in *PA Northwestern Distributors, Inc. v. Zoning Hearing Board of the Township of Moon*, 526 Pa. 186, 584 A.2d 1372 (1991) and as noted above, in the instant case, there has been a specific finding that the ordinance in question was unconstitutional.

In summary, a zoning ordinance which has been found unconstitutional results in an automatic taking. A zoning ordinance which has been declared unconstitutional, in the words of Justice Oliver Wendell Holmes, is a regulation which goes too far and is therefore, a taking. It is a taking *because it does not* substantially advance legitimate state interests, *Agins*, *supra*.

The finding that there has been a taking allows a property owner to seek damages for the actual losses which it has suffered as a result of the unconstitutional zoning ordinance. It is the traditional "but for" test which was initially set forth by Judge Weaver in the Court of Common Pleas of Bucks County as follows:

> The Petition submitted by Miller conclusively established that but for the Township's unconstitutional zoning ordinance, the land would have been mined by Miller. As Miller was precluded from using the land as a quarry during the period the ordinance was being challenged, a compensable *de facto* taking occurred as a matter of law.

(Emphasis added)

As your Honorable Court recognized in *First English*, an invalidation of an unconstitutional zoning ordinance simply converts the taking to a temporary one, it does not provide a remedy sufficient to meet the demands of the compensation clause of the Fifth Amendment of the United States Constitution.

Therefore, the declaration that Plumstead Township's zoning ordinance was unconstitutional resulted in an automatic *de facto* taking. The Decision of the Pennsylvania Supreme Court that a compensable taking does not result when a property owner is found to have been prevented from making a lawful use of its property by a zoning ordinance which is ultimately declared invalid is inconsistent with the Decisions of your Honorable Court. Therefore, this Petition should be granted. Petitioner should be given the opportunity to prove those damages which it would not have incurred but for the invalidity of the zoning ordinance which prevented the lawful use of its property.

CONCLUSION

For the reasons stated above, the Petitioner requests your Honorable Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT DECIDED AUGUST 19, 1998

[J-176-1997]
THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

19 E.D. Appeal Docket 1997

MILLER AND SON PAVING, INC.,

Appellee

v.

PLUMSTEAD TOWNSHIP,
BUCKS COUNTY, PENNSYLVANIA

Appellant

Appeal from the Order of the Commonwealth Court dated June 21, 1996, at 1341 C.D. 1995, affirming the Order of the Bucks County Common Pleas Court dated May 5, 1995, at 94-000389-22-5

ARGUED: October 21, 1997

OPINION

MR. JUSTICE ZAPPALA DECIDED: AUGUST 19, 1998

We granted allocatur to determine whether the Commonwealth Court erred in holding that a township zoning

ordinance, which was found unconstitutional due to its exclusion of quarrying as a permitted use, automatically effected a compensable temporary *de facto* taking of the landowner's property. For the reasons that follow, we reverse the order of the Commonwealth Court and hold that a per se compensable taking does not result from a zoning ordinance which is ultimately declared invalid.

On June 17, 1998, Miller and Son Paving, Inc., (Miller/Appellee), purchased approximately 150 acres of land in Plumstead Township, Bucks County, (Township/Appellant). On the same, day, Miller filed an application with the Township for a curative amendment to the zoning ordinance. Miller contended that the ordinance was unconstitutional because it failed to make provisions for quarrying, bituminous asphalt plants and ready-mix concrete plants. The Board of Supervisors of Plumstead Township denied the application and Miller appealed to the Bucks County Common Pleas Court.

The common pleas court held that the ordinance unconstitutionally excluded quarrying in the Township but denied site-specific, relief. The Commonwealth Court affirmed that portion of the common pleas court's order which found that the ordinance excluded quarrying, but reversed the determination that Miller was not entitled to site-specific relief. *Appeal of Miller and Son Paving, Inc.*, 636 A.2d 274 (Pa. Cmwlth. 1993), *alloc. denied*, 846 A.2d 1182 (Pa. 1995). The matter was remanded to the common pleas court to determine the extent to which Miller was permitted to establish a quarry. On remand, the common pleas court entered an order approving the use of the property as a quarry, bituminous asphalt plant and ready-mix concrete plant. The Commonwealth Court thereafter reversed, but only as to the common pleas court's approval of asphalt and concrete plants.

Appendix A

In the meantime, Miller had filed a petition for the appointment of a board of viewers to assess damages for the temporary *de facto* taking of the property during the period in which Miller was precluded from quarrying while challenging the constitutionality of the zoning ordinance. Specifically, Miller sought damages for the interest paid on its mortgage, loss of profits due to its inability to quarry and the costs it incurred in the curative amendment proceedings, The Township filed preliminary objections to the petition contending that Miller's claim of a *de facto* taking was not ripe because there was no final determination that the ordinance unconstitutionally excluded quarrying, and that the complaint failed to state a cause of fiction for a temporary *de facto* taking.

The common pleas court dismissed the Township's preliminary objections without a hearing. It found that the zoning ordinance deprived Miller of the use and enjoyment of its property because the land would have been quarried had it not been for the unconstitutional provision. The court concluded, as a matter of law, that Miller established a compensable temporary *de facto* taking for the period between the date the property was purchased and the date the zoning ordinance was invalidated.

The Commonwealth Court affirmed, finding that the trial court did not abuse is discretion in dismissing the Township's preliminary objections. It relied on the United States Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987), for the proposition that Miller was not precluded from bringing an action under the Eminent Domain Code for damages it allegedly suffered during the period of the temporary taking. It rejected the Township's claim that other permissive uses of the property

existed. The court held that to establish a *de facto* taking, the landowner must only establish that there were "exceptional circumstances" which substantially deprived the property owner of the beneficial use and enjoyment of his property. It concluded that the enforcement of the ordinance later found invalid constituted such an exceptional circumstance.[1]

The issue, in its most basic form, is whether an exclusionary zoning ordinance constitutes a *per se* taking of the property affected by the ordinance. The Township contends that delays attributable to legal challenges to zoning provisions do not automatically constitute a taking because viable uses of the property may remain unaffacted by the illegal provision. It asserts that because Miller was never denied all viable or economic use of its property and Miller was ultimately granted the right to quarry, no taking occurred prior to the time when the ordinance was deemed unconstitutional. It further suggests that the decision of *First English* is distinguishable and is expressly limited to its facts. We agree.

A landowner alleging a *de facto* taking is under a heavy burden to establish that such a taking has occurred. *Zettlemover v. Transcontinental Gas Pipeline Corporation*, 540 Pa. 337, 657 A.2d 920 (1995). A taking occurs whenever the entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property.

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1. The appellate scope of review in a case where the trial court has dismissed preliminary objections to a petition for an appointment of viewers is limited to a determination of whether the trial court abused its discretion or committed an error of law, *Faleski v. Department of Transportation*, 633 A.2d 1308 (Pa. Cmwlth. 1093).

Id.[2] In *United Artists' Theater Circuit Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612 (1993), we enumerated the following three conditions for determining whether a valid regulatory restriction constitutes a taking requiring just compensation:

> (1) the interest of the general public, rather than a particular class of persons, must require governmental action,
>
> (2) the means must be necessary to effectuate that purpose; and
>
> (3) the means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.

Id. at 381, 635 A.2d at 618.

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2. The takings clause in the Pennsylvania Constitution provides:

> Nor shall private property be taken or applied to public use, without authority of law and without just compensation being made or secured.

Pa. Const. art, 1, § 10.

Similarly, the United States Constitution states:

> No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Appendix A

The Township focuses on the third condition and contends that the ordinance, though ultimately doomed exclusionary, was not unduly oppressive. In discussing that factor in *United Artists*, we noted that a taking does not result merely because a regulation may deprive the owner of the most profitable use of his property. Otherwise, all zoning regulations could be categorized as "takings" in the sense that the owner is not completely free to use his property as he chooses. Here, the property was zoned residential. Although the ordinance deprived Miller of the use of quarrying, other viable uses clearly existed.[3] Accordingly, we hold that the lower courts erred in concluding that the invalid zoning ordinance constituted a taking of Miller's property.[4]

First English does not require a contrary result. There, the County of Los Angeles adopted an interim ordinance prohibiting the construction or reconstruction of any building or structure in a flood protection area. The appellant, a church that had purchased property in the protected area prior to the adoption of the ordinance, sought damages for the loss of use of the property. The United States Supreme Court held that the Fifth and Fourteenth Amendments to the United States Constitution require that the landowner be compensated for the period of time before it was finally determined that the

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3. Miller's 150 acres were zoned R-1 which permitted, *inter alia*, single family detached dwellings, farm and accessory buildings, public buildings, home occupations and accessory offices for a physician, lawyer, clergymen or other profession.

4. Moreover, we note that a holding to the contrary could have a chilling effect on land use planning as the adoption of an invalid ordinance could prove financially devastating to a municipality which unsuccessfully defends a lengthy constitutional challenge.

regulation constituted a taking. This decision is distinguishable from the instant case for several reasons.

First, and most significantly, the Court in *First English* accepted as fact for purpose of its analysis that the landowner was deprived of *all* beneficial use and enjoyment of the property.[5] The Court stated that " 'temporary takings which, at, here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318. Unlike the landowner in *First English*, however, Miller was not denied all use of its property, but was rather illegally denied the use of quarrying.

Second, *First English* did not involve the invalidation of an unconstitutional zoning ordinance. The landowners did not challenge the validity of the ordinance but merely sought damages pursuant to a takings claim. Thus, *First English* does not support the conclusion reached by the Commonwealth Court that an invalid zoning ordinance effects a per se temporary taking. The Commonwealth Court erroneously confused the legal concepts applicable to takings claims and regulation validity issues.[6]

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5. The Court stated that it "assume[d] that the Los Angeles County ordinance has denied appellant all use of its property for a considerable period of years," and held that invalidation of the ordinance without payment was a constitutionally insufficient remedy. *Id.* at 322.

6. A validity inquiry involves the determination of whether a governmental action is encompassed within its scope of power. In a takings inquiry, however, the question is whether the govemmental action effectively deprived the landowner of all beneficial use of his property, regardless of whether the action in question was a valid exercise of governmental power.

Finally, the decision in *First English* was specifically limited to the facts presented. The Court explained that it "[did] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.* at 321.[7]

Accordingly, the order of the Commonwealth Court is reversed and the preliminary objections of the Township are sustained.

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7. We recognize that the law of the Commonwealth prior to the decision in *First English* provided that the exclusive remedy for challenging a zoning regulation on the ground that it was confiscatory was under the Municipalities Planing Code. *Kraiser v. Horsham Township* 455 A.2d 782 (Pa. Cmwlth. 1983); *Wyoming Borough v. Wyco Realty Co.*, 440 A.2d 696 (Pa. Cmwlth. 1982); *Gaebel v. Thombury Township*, 303 A.2d 57 (Pa. Cmwlth. 1973). In *McClimans v. Board of Supervisors v. Shenango Township*, 529 A.2d 562 (Pa. Cmwlth. 1987), however, the Commonwealth Court noted in dicta that, pursuant to *First English*, a compensable temporary taking would arise for the period of time that a zoning ordinance conclusively prevented the removal of coal from a coal estate. Unlike the instant case, the ordinance in *McClimans* precluded the single use the property possessed. The Commonwealth Court's reliance on *McClimans* was therefore erroneous.

APPENDIX B — OPINION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED JUNE 21, 1996

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1341 C.D. 1995

Argued: February 5, 1996

MILLER AND SON PAVING, INC.

v.

PLUMSTEAD TOWNSHIP,
BUCKS COUNTY, PENNSYLVANIA,

Appellant

BEFORE: HONORABLE, JAMES GARDNER COLINS,
President Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE CHARLES P. MIRARCHI, JR.,
Senior Judge

OPINION BY
SENIOR JUDGE MIRARCHI FILED: June 21, 1996

The Board of Supervisors of Plumstead Township (Board) appeals from an order of the Court of Common Pleas of Bucks County (trial court) which overruled the Board's preliminary objections to the petition for appointment of a board of viewers

filed by Miller and Son Paving Incorporated (Miller) pursuant to Section 502(e) of the Eminent Domain Code.[1]

In June, 1988, Miller acquired a 150-acre tract of land in Plumstead Township. The property was zoned R-1, Rural Residential. On the same day Miller acquired the property, it filed an application for a curative amendment, challenging the Plumstead Township Zoning Ordinance (Zoning Ordinance) on the grounds that it failed to make provisions for quarrying, bituminous asphalt plants and ready-mix concrete plants. The Board rejected the proposed amendment on the grounds that quarrying, bituminous asphalt plants and ready-mix concrete plants were permitted in the Limited Industrial District.

Miller appealed to the trial court which determined that the Zoning Ordinance excluded quarrying but denied site-specific relief. Miller then appealed to this Court which affirmed that part of the trial court's order which found that the Zoning Ordinance excluded quarrying but reversed the trial court's determination that Miller was not entitled to site-specific relief.[2] The Court then remanded the case to the trial court to determine whether Miller's use of the property should be approved as to all elements or as to some elements. On remand, the trial court entered an order approving the use of the property as a quarry, bituminous asphalt plant and a ready-mix concrete plant.

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1. Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §1-502(e)

2. *Appeal of Miller and Son Paving, Inc.*, 636 A.2d 274 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, __ Pa. __, 646 A.2d 1182 (1995).

Appendix B

On January 21, 1994, Miller filed a petition for appointment of a board of viewers alleging that the Zoning Ordinance unconstitutionally excluded quarrying, which conclusively prevented Miller from mining stone from its property. Miller sought as damages reimbursement for the interest paid on its mortgage, loss of profits due to its inability to quarry on the property and the costs it incurred in the curative amendment proceedings. The Township filed preliminary objections to the petition averring that Miller's claim of a de facto taking was not ripe because there was no final determination that the Zoning Ordinance unconstitutionally excluded quarrying and that the complaint failed to state a cause of action for a temporary de facto taking.

The trial court overruled the Township's preliminary objections. The trial court found that because Miller was precluded from using the land as a quarry during the period the Zoning Ordinance was being challenged, a compensable temporary de facto taking occurred as a matter of law. The Township now appeals to this Court.

On appeal, the Township argues (1) Miller has not established that a taking has occurred as a matter of law and (2) Miller has not suffered a temporary taking where it was not deprived of all economically beneficial use of its property during the pendency of its curative amendment challenge.

The filing of a petition for the appointment of viewers, when there has been no declaration of taking filed by the condemnor, is specifically authorized by Section 502(e) of the Eminent Domain Code. *Millcreek Township v. N.E.A. Cross Co.*, 620 A.2d 558 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, 537 Pa. 655, 644 A.2d 739 (1994).

Appendix B

Preliminary objections are the exclusive method under the Eminent Domain Code of raising, legal and factual objections to a petition for appointment of viewers which alleges a de facto taking. *Reidel v. County of Allegheny*, 633 A.2d 1325 (Pa. Cmwlth. 1993).

When preliminary objections are filed in a de facto taking case, the trial court must determine first whether, as a matter of law, the averments of the petition for the appointment of viewers, taken as true, are sufficient to state a cause of action for a de facto taking. *Department of Transportation v. Mano*, 613 A.2d 119 (Pa. Cmwlth. 1992). If the preliminary objections raise an issue of fact, the resolution of which is necessary for determining whether a de facto taking has occurred, the court must hold an evidentiary hearing. *Millcreek Township, supra.* If the preliminary objections do not raise any such issue of fact, the trial court must simply examine the petition and dismiss the preliminary objections if the averments of the petition are sufficient to establish a de facto taking. *Id.*

Where the trial court has dismissed preliminary objections to a petition for appointment of a board of viewers pursuant to the Code, this Court's scope of review is limited to a determination of whether the trial court abused its discretion or committed an error of law. *Faleski v. Department of Transportation*, 633 A.2d 1308 (Pa. Cmwlth. 1993).

The Township first argues that a landowner who asserts the invalidity of a zoning ordinance cannot seek damages under the Eminent Domain Code, but has, as his exclusive remedy, a challenge to the substantive validity of the zoning ordinance under the Pennsylvania Municipalities Planning Code (MIC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101 - 11201.

Appendix B

In *Gaebel v. Thornbury Township*, 303 A.2d 57 (Pa. Cmwlth. 303 A. 1973), the landowners' property was rezoned from commercial to flood plain. They sought damages under the Eminent Domain Code for the effect of a change in zoning classification upon their property. They contended that the amended zoning ordinance took their property without just compensation by severely restricting its use. On appeal, this Court stated that the landowners' "exclusive recourse is to challenge the constitutionality of Thornbury's zoning ordinance under the provisions of review established by the MPC, and they cannot at this time avail themselves of compensation under the provisions of the Eminent Domain Code." *Id.* at 60. *Accord*, *Kraiser v. Horsham Township*, 455 A.2d 782 (Pa. Cmwlth. 1983); *Wyoming Borough v. Wyco Realty Co.*, 440 A.2d 696 (Pa. Cmwlth. 1982).

In 1987, the United States Supreme Court issued its decision in *First English Evangelical Lutheran Church Of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). In that case, the Supreme Court held that the Fifth and Fourteenth Amendments of the United States Constitution require that "a landowner who claims that his property has been taken by a land-use regulation may . . . recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." *Id.* at 306-7.

In *McClimans v. Board of Supervisors of Shenango Township (McClimans I)*, 529 A.2d 562 (Pa. Cmwlth. 1987), the landowners argued that the local zoning ordinance prevented them from accessing their coal estate. On appeal, this Court stated that if it can be shown that the extraction of the coal had been conclusively prevented, then the ordinance would be rendered invalid as a taking without just compensation. The

Court went on to add, citing *First English*, that if a taking had occurred and the township subsequently amended its ordinance to allow the strip mining, the township would then be required to pay just compensation for the "temporary taking." *See also Odhner v. Township of Woodward*, 599 A.2d 276, 279 (Pa. Cmwlth. 1991) ("We recognize that a landowner, subjected to a temporary taking, can be entitled to compensation for the deprivation of the use of the property during the time period which precedes a decision invalidating the regulation."); *Appeal of Doyle*, 598 A.2d 352, 354 (Pa. Cmwlth. 1991) ("appellants must first exhaust their remedies under the MPC before they can bring an action for inverse condemnation under the Eminent Domain Code.")

We conclude, based on the Supreme Court decision in *First English* and this Court's cases applying that decision, that Miller is not precluded from bringing an action under the Eminent Domain Code for damages it allegedly suffered during the period of the temporary taking.

The Township next argues that Miller did not suffer a temporary taking of its property during the pendency of its curative amendment challenge because, under *First English*, it was not deprived of all economically beneficial use of its property. The Township contends that numerous uses were permitted in the R-1 District at the time Miller filed its curative amendment.

Courts of this Commonwealth have not required a landowner to prove that he or she has been deprived of all beneficial use of the property. To establish a de facto taking, the landowner must establish that there were exceptional circumstances which substantially deprived the property owner

of the beneficial use and enjoyment of his or her property. *Appeal of D.R.E. Land Developing, Inc.*, 613 A.2d 96 (Pa. Cmwlth. 1992). Whether property owners have been substantially deprived of the beneficial use and enjoyment of their property as a consequence of activities by the alleged condemnor is dependent upon the type of use property owners have made of their property. *Erie Municipal Authority v. Agostini*, 561 A.2d 1281. (Pa. Cmwlth. 1989). For purposes of determining whether there was a de facto taking of property has occurred, the beneficial use of the property includes not only its present use, but also all potential uses, including its highest and best use. *Department of Transportation v. Steppler*, 542 A.2d 175 (Pa. Cmwlth. 1988.).

In the case before us, the trial court found that the Zoning Ordinance, subsequently invalidated, comprised an 'exceptional circumstance' that deprived Miller of the use and enjoyment of the property." (Trial Court Opinion, p. 5.) The trial court also found that "[t]he petition submitted by Miller conclusively established that but for the Township's unconstitutional ordinance, the land would have been mined by Miller." *Id.*

The petition for appointment of viewers submitted by Miller complies with the requirements of Pennsylvania caselaw for the establishment of a de facto taking. We therefore conclude that the trial, court did not abuse its discretion or commit an error of law in dismissing the Township's preliminary objections.

The order of the trial court is affirmed.

s/ Charles P. Mirarchi, Jr.
CHARLES P. MIRARCHI, JR., Senior Judge

Appendix B

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1341 C.D. 1995

MILLER AND SON PAVING, INC.

v.

PLUMSTEAD TOWNSHIP, BUCKS
COUNTY, PENNSYLVANIA,

Appellant

ORDER

AND NOW, this 21st day of June, 1996, the order of the Court of Common Pleas of Bucks County in the above-captioned matter is hereby affirmed.

s/ Charles P. Mirarchi, Jr.
CHARLES P. MIRARCHI, JR., Senior Judge

APPENDIX C — OPINION OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA DATED AUGUST 20, 1995

IN THE COURT OF COMMON PLEAS OF
BUCKS COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

No. 94-000389-22-5

MILLER AND SON PAVING, INC.

v.

PLUMSTEAD TOWNSHIP,
BUCKS COUNTY, PENNSYLVANIA

OPINION

FACTS:

Plaintiff, Miller and Son Paving, Inc. (hereinafter "Miller") acquired a one hundred and fifty (150) acre tract of land in Plumstead Township. Bucks County (hereinafter "Township") in June, 1988. At the time of the purchase, the Plumstead Township Zoning Ordinance excluded quarrying and its accessory uses from the Township. *See infra*. Miller thereafter filed a curative amendment application with the Township, seeking to declare the zoning ordinance unconstitutional because it excluded quarrying and its accessory uses.

After multiple hearings spanning a period of forty-six (46) months, the Board of Supervisors of Plumstead Township

denied the curative amendment application, and an appeal was filed to the Court of Common Pleas of Bucks County. A panel of three judges concluded that the zoning ordinance totally excluded quarrying as a permissible use within the township and therefore was unconstitutional. However, site specific relief to quarry the property was denied. Miller appealed that decision to the Commonwealth Court, which affirmed in part, reversed in part and remanded the case with the following order:[1]

> AND NOW, this 30th day of December, 1993 the opinion and order of Common Pleas are affirmed in part and reversed in part. Common Pleas is affirmed insofar as it ruled that the ordinance excludes quarrying. It is affirmed insofar as it impliedly ruled that the ordinance does not exclude bituminous asphalt plants and ready mix concrete plants. It is reversed insofar as it ruled that Miller is not entitled to site specific relief. This matter is remanded to Common Pleas for determination, pursuant to Section 1006-A(c) of the Pennsylvania Municipalities Planning Code, 53 P.S. §11006-A(c) regarding whether Miller's use of the property as a quarry is "approved as to all elements" or "approved as to some elements, [requiring] other elements [to be referred) to the governing body . . . for further proceedings . . ."
>
> Jurisdiction is relinquished.
>
> JAMES GARDNER COLINS, J.

1. Township's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied.

Appendix C

On remand, the lower court entered an order on September 13, 1994, approving the use of the property as a quarry, bituminous asphalt plant, and a readi-mix concrete plant on the premises in question. Thereafter, Miller filed a Petition for Appointment of a Board of Viewers (hereinafter "Petition") to assess damages for the temporary, de facto taking of the property during the period in which Miller was denied use of the property for quarrying while successfully challenging the constitutionality of the Zoning Ordinance. Township filed preliminary objections to the petition. On May 5, 1995, the undersigned entered an order overruling and denying said preliminary objections. Subsequently, defendant filed this timely appeal. This Opinion is written in support of the Court's Order.

Pursuant to Pa. R.A. P. § 1925(b) , Township cites six (6) specific errors as follows:

1. The Petition failed as a matter of law to establish that a de facto taking occurred;

2. The Petition failed an a matter of law to establish that a temporary taking occurred;

3. That an evidentiary hearing was required to establish whether or not a taking had occurred as a matter of fact;

4. The Petition failed to establish that plaintiff has been deprived of all economically beneficial use of its property;

5. That plaintiff's exclusive remedy is Pennsylvania Municipalities Planning Code, 53 P.S. § 1001-A; and

Appendix C

6. The Petition failed to establish that application for a use permit has been made or such application had been denied.

DISCUSSION:

Preliminary objections in the context of eminent domain actions serve a broad purpose intended to resolve both factual and legal challenges. *N. Penn Water v. A Certain Parcel of Land Identified By Last Known Owner and Tax Parcel Number as Michael H. Malin and Doroth Seimel Malin,* __ Pa. Commw. __, 650 A.2d 1197, 1201 (1994). The proper mode of challenging a petition for appointment of viewers filed by condemnee is by preliminary objections. *In re Commendation by Com., Dept. of Transp.*, 112 Pa. Commw. 368, 535 A.2d 121.0 (1988), *appeal denied*, 519 Pa. 655, 546 A.2d 60. An order dismissing preliminary objections to a petition for appointment of viewers under the eminent domain code is a final appealable order that will not be overturned absent abuse of discretion or error of law by the trial court. *Riedel v. County of Allegheny,* 159 Pa. Commw. 583, 633 A.2d 1325 (1993).

The Eminent Domain Code authorizes filing of a petition for appointment of viewers when there has been no declaration of taking filed by the condemnor. *Millcreek Tp. v. N.E.A. Cross Co.,* 152 Pa. Commw. 576, 620 A.2d 558 (1993), *appeal denied,* 537 Pa. 655, 644 A.2d 739. When a petition for a board of viewers alleges a de facto taking and preliminary objections are thereafter filed, an evidentiary hearing is not necessary if an issue of fact is not raised. *Id.* When no disputed factual issue exists and the issues before the trial court are purely legal, preliminary objections may be ruled upon without a hearing. 26 P.S. § 1-504; *Millcreek Tp.,* 152 Pa. Commw. 576, 620 A.2d at 588.; *Miller v. Com. Dept. of Transp.*, 91 Pa. Commw. 622, 498 A.2d 1370 (1985).

Appendix C

This Court, upon review of Miller's petition, determined that a cause of action for compensable injury by reason of a temporary de facto taking existed and that only legal issues remained to be resolved. Miller appropriately submitted the petition under the Eminent Domain Code, upon completing a successful challenge of the ordinance under the Municipalities Planning Code. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Appeal of Doyle*, 142 Pa. Commw. 672, 598 A.2d 352 (1991). The petition set forth facts sufficiently demonstrating that due to Township's ordinance, declared unconstitutional by the Court of Common Pleas and affirmed by the Commonwealth Court, *In re Miller and Son Paving, Inc.*, 161 Pa. Commw. 138, 636 A.2d 272 (1993), allocatur denied, 538 Pa. 629, 646 A.2d 1182, Miller was substantially precluded from utilizing its land during the period that the constitutionality of the ordinance was being challenged.

A taking occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property. *Petition of Cornell Industrial Elec., Inc.*, 19 Pa. Commw. 599, 338 A.2d 752 (1975); *see also* Moore *v. Commonwealth of Pennsylvania, Department of Environmental, Resources*, __ Pa. Commw. __, 660 A.2d 677 (1995). "In order to establish a de facto taking the property owner must show that there are exceptional circumstances which have substantially deprived him of the beneficial use and enjoyment of his property." *Reidel v. County of Allegheny*, 159 Pa. Commw. 583, 633 A.2d 1325, 1328 (1993). (citations omitted). The Township ordinance, subsequently invalidated, comprised an "exceptional circumstance" that deprived Miller of the use and enjoyment of the property, with Miller incurring costs of carrying the property and the curative amendment challenge.

Appendix C

The petition submitted by Miller conclusively established that but for Township's unconstitutional ordinance, the land would have been mined by Miller. As Miller was precluded from using the land as a quarry during the period the ordinance was being challenged, a compensable temporary de facto taking occurred as a matter of law. In *McClimans v. Board of Supervisors of Shenango Township*, 107 Pa. Commw. 542, 529 A.2d 562, 570 (1987) (McClimans I), the Commonwealth Court remanded to Common Pleas so that evidence could be taken to determine whether or not an ordinance in question was unconstitutional, thereby causing an invalid taking. In so doing, the Commonwealth Court stated:

> "[I]f it can be shown that the extraction of the coal has been conclusively prevented, then the ordinance will be rendered invalid as a taking without just compensation . . . If there is a 'taking and the Township subsequently amends the ordinance to allow the strip mining, the Township would then be required to pay just compensation for the harm caused to the appellants by the 'temporary taking.' "

Id. at 570 (citing *First Evangelical Lutheran Church of Glendale*, 482 U.S. at 304, 107 S.Ct. at 2378, 96 L.Ed.2d. at 250.).

As no issue of fact was raised by Township, this Court addressed the legal issue of whether or not a temporary and/or de facto taking occurred. Such legal findings were based upon the record in the instant case, as well as the record, Orders and Opinions in the companion case, *Miller and Son Paving Inc. vs. Plumstead Township*, 65 Bucks Co. L. Rep., pp. 207-217

(Dec. 22, 1994); and *In re Miller and Son Paving, Inc.*, 161 Pa. *Commw.* 138, 636 A.2d 272 (1993), allocatur denied, 538 Pa. 629, 646 A.2d 1182. This Court determined that Miller was substantially deprived of the beneficial use and enjoyment of its property because of the exceptional circumstance of Township's unconstitutional ordinance. Therefore, as a matter of law, the petition established that a temporary de facto taking had occurred during the period in which Miller commenced ownership of the property until such date that the ordinance was stricken.

Finally, this Court determined that the Petition for Appointment of a Board of Viewers should be granted to assess any compensation forthcoming to Miller, as the Township's ordinance was successfully challenged under M.P.C. 53 P.S. § 1001-A and the appropriate uses were approved.[2] Miller reasonably believes that applying for the appropriate permits would have been fruitless, as the Township would not issue such permits. This Court agrees with Miller that such application would be futile. It is noted that in *Lucas v. South Carolina Coastal Council*, 505 U.S. __, __, n.3, 112 S.Ct. 2886, 2891-92, n.3, 120 L.Ed.2d 798, 810-11 n.3, Scalia wrote: "[S]uch a submission [of a plan to the state authorities] would

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2. Bucks County Court of Common Pleas Order of September 13, 1994, reads in pertinent part "AND NOW, this 13th day of September 3, 1994, pursuant to the order of the Commonwealth Court in the within matter and pursuant to Section 100GA(c) of the Municipalities Planning Code, 53 P.S. 110615-A(c), appellant's use of the property as a quarry, a bituminous asphalt plant, and a readi-mix concrete plant must be and thereby is APPROVED on the premises in question . . ." Township has again appealed that order to the Commonwealth Court, *Miller Paving Inc., v. Plumstead Township*, No. 2610 Civ. (1994). Said appeal is pending.

have been pointless, as the Council stipulated no building permit would have been issued . . . Lucas properly alleged injury-in-fact in his complaint . . . No more can reasonably be demanded." *Id.*

For the foregoing reasons, Township's preliminary objections were denied, dismissed and overruled.

BY THE COURT:

s/ Cynthia M. Weaver
CYNTHIA M. WEAVER, J.

DATED: August 20, 1995